Supreme Court, U.S.
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SEP 4 1979
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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1608

JAMES F. WARDELL,
Petitioner,

VERSUS

STATE OF TEXAS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS FOR THE STATE OF TEXAS

PETITIONER'S REPLY MEMORANDUM AND SUPPLEMENTAL BRIEF

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September, 1979

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The State of Texas, in its opposing brief in Cause No. 78-1608, continues to commit the same sin it was condemned for by Judge Odom in *Kirkpatrick* v. *State*, 515 S.W.2d 289 (Tex. Cr. App. 1974), when the Texas Court of Criminal Appeals held that evidence showing a series of transactions occurring between June 2, 1969 and June 21, 1972 could properly be introduced as evidence to convict the Defendant of an *October 15, 1970 transaction*. Here, the State of Texas insists that evidence showing separate transactions occurring October 2nd and October 27th, 1972, could properly be introduced as evidence to convict the

Petitioner of a *February 10, 1972* transaction. In the words of Judge Roberts and Judge Odom, such action "has no support in law." In fact, such action is contrary to holdings in numerous decisions by State Supreme Courts and Federal Courts of the Criminal Appeal.*

The importance of the questions presented in this Petition have been denied by the Respondent but its argument begs the question before this Honorable Court. There is no question that the proof adduced at trial did *not* conform to Count II of the indictment (which the Respondent specifically elected to proceed on at trial). Nor did the trial court adhere to its order granting Petitioner's Motion In Limine. Evidence was permitted to be introduced which related to transactions occurring a full ten (10) months after the date of the activity for which the Petitioner was indicted. It is unquestionable that the transactions occurring in October not only involved different persons, but were different in type and degree from the transaction occurring in February, 1972. And even after such evidence was introduced, no limiting instruction was given to the jury. Hence it is impossible to determine what evidence was used by the jury to determine the Petitioner's guilt, or for that matter what exactly the Petitioner is guilty of. Yet, the Respondent alleges that if any error was committed, it was harmless error. Such flagrant disregard for

* Petitioner's counsel respectfully directs the Court's attention to the fact he has previously cited two important cases improperly. *Shack* v. *State of Florida*, 391 F.2d 503 (5th Cir. 1968), should have been cited *Sutton* v. *United States*, 391 F.2d 592 (5th Cir. 1968); and *Morton* v. *United States*, 351 F.2d 457 (10th Cir. 1965), should have been cited *Condrey* v. *United States*, 351 F.2d 456 (5th Cir. 1965).

the fundamental requirements of due process should not be allowed to go unchecked.

In light of the inability of the State of Texas to face squarely the issues presented in this Petition either with substantial factual argument or without relying on the *Kirkpatrick* decision, itself unconstitutional, the need for plenary review of the action below is indisputable; indeed, Petitioner suggests that summary reversal is now in order.

Respectfully submitted,

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Counsel for Petitioner

September, 1979

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of August, 1979, three copies of this Reply Memorandum and Supplemental Brief were mailed, postage prepaid to the following:

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Potter County District Attorney
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Amarillo, Texas 79101
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I further certify that all parties required to be served have been served.

Stephen Jones